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WASHINGTON'S PUBLIC LAW 280 JURISDICTION ON INDIAN RESERVATIONS

The jurisdictional relationship between Indian tribes and federal and state governments has always been an area of the law with few constants. Since Chief Justice Marshall provided the foundation in *Worcester v. Georgia*,¹ Congress and the courts have struggled to construct a viable jurisdictional scheme that would balance the competing interests of the states, the federal government, and the Indian tribes. The rate of flux has quickened recently with several pending and recently decided Supreme Court decisions.² Of particular interest to Washington is a Ninth Circuit case pending Supreme Court review, *Confederated Bands & Tribes of the Yakima Indian Nation v. Washington (Yakima I and Yakima II)*,³ which will determine the extent of the state's jurisdiction over Indian reservations.

Since 1957 the criminal and civil jurisdiction of the State of Washington over Indian reservations has been governed by R.C.W. ch. 37.12.⁴ The Washington statute was enacted pursuant to permission granted by the federal government in 1953 by Public Law 83-280 (PL-280).⁵ Prior to the passage of PL-280, state jurisdiction over In-

1. 31 U.S. (6 Pet.) 515 (1832) (setting forth the limits of tribal sovereignty with respect to federal and state governments).

2. See, e.g., *United States v. Wheeler*, 98 S. Ct. 1079 (1978); *Oliphant v. Suquamish Indian Tribe*, 98 S. Ct. 1011 (1978); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, *prob. juris. noted*, 98 S. Ct. 1447 (1978) (No. 77-388).

3. 550 F.2d 443 (9th Cir. 1977) (en banc) [hereinafter *Yakima I*], *dist. ct. rev'd on remand*, 552 F.2d 1332 (9th Cir. 1977) (three-judge panel) [hereinafter *Yakima II*], *prob. juris. noted*, 98 S. Ct. 1447 (1978) (both decisions on appeal).

4. WASH. REV. CODE § 37.12.010-.070 (1976). Prior to 1957 jurisdiction over reservation Indians was shared by the federal government and the Indian tribes, the states having some residual jurisdiction over matters not involving Indians and not infringing on tribal self-determination. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170-72 (1973); *Williams v. Lee*, 358 U.S. 217, 219-21 (1959); *United States v. McBratney*, 104 U.S. 621 (1882). See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 116-21, 358-82 (1942).

5. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976)). The Act was amended in 1968, Pub. L. No. 90-284, §§ 401-406, 82 Stat. 78 (1968) (codified in 18 U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976)). However, the 1953 Act, rather than the 1968 amendment, is the controlling federal statute because R.C.W. ch. 37.12 was last amended in 1963.

PL-280 divides states containing Indian lands into three groups. Six states (with the inclusion of Alaska in 1958, Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (1958) (codified at 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976))) were given, with certain qualifications, outright civil and criminal jurisdiction over Indian reservations [hereinafter mandatory states]. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588-89. Eight states, including Washington, with disclaimers of Indian jurisdiction in their state constitutions and statehood acts were given permission to repeal the dis-

dian reservations was generally limited to affairs involving only non-Indians and not infringing on tribal self-determination,⁶ as well as certain areas where Congress expressly granted additional jurisdiction.⁷ As amended in 1963,⁸ R.C.W. ch. 37.12 gave the state criminal and civil jurisdiction as provided in PL-280 over all privately owned land lying within the boundaries of a reservation (fee lands). However, on those portions of a reservation owned by the tribe or held in trust by the federal government (non-fee land), the state assumed criminal and civil jurisdiction only in eight subject areas,⁹ unless a tribe requested full PL-280 jurisdiction.¹⁰

Since its enactment, R.C.W. ch. 37.12 has been challenged by several Washington tribes for failing to comply with PL-280, the Washington Statehood Act,¹¹ and the Washington Constitution.¹² Until last year the statute had been upheld by both state¹³ and federal¹⁴ courts.

claimer by amending their constitution [hereinafter disclaimer states]. *Id.* § 6, 67 Stat. 590. Any other state not having jurisdiction over Indian lands was given permission to assume the same jurisdiction given mandatory states by taking affirmative legislative action binding the state to assume such jurisdiction [hereinafter option states]. *Id.* § 7, 67 Stat. 590. For an extensive treatment of PL-280, see Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

6. See F. COHEN, *supra* note 4, at 116-21, See also *Williams v. Lee*, 358 U.S. 217, 219-21 (1959); *Draper v. United States*, 164 U.S. 240 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

7. Congress had granted some states jurisdiction over specific reservations within the state (e.g., Act of Oct. 5, 1949, Pub. L. No. 81-322, 63 Stat. 705 (California granted criminal and civil jurisdiction over the Agua Caliente Indian Reservation)), had granted some states jurisdiction over all reservations within the state (e.g., 25 U.S.C. §§ 232, 233 (1976) (New York)), and had granted all states jurisdiction over certain subject matters (e.g., 25 U.S.C. § 231 (1976) (health inspection and compulsory school attendance)).

8. Under the original statute Washington assumed jurisdiction on a reservation only if a tribe requested state jurisdiction. Ch. 240, § 2, 1957 Wash. Laws 941. The 1963 amendments modified this requirement for tribes that had not yet requested state jurisdiction. See notes 9-10 and accompanying text *infra*.

9. The eight areas are (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental health; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads, and highways. WASH. REV. CODE § 37.12.010 (1976).

10. WASH. REV. CODE § 37.12.021 (1976). Those tribes that had consented to state jurisdiction prior to 1963 retained full state PL-280 jurisdiction. WASH. REV. CODE § 37.12.010 (1976). The state will extend full PL-280 jurisdiction to any other tribe that requests such jurisdiction. WASH. REV. CODE § 37.12.021 (1976). Prior to 1963 10 of Washington's 22 tribes had requested full state jurisdiction, but on two of those reservations full PL-280 jurisdiction has since been rescinded. Since 1963 one reservation, the Colville, has requested full PL-280 jurisdiction. 1 NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, JUSTICE AND THE AMERICAN INDIAN: THE IMPACT OF PUBLIC LAW 280 UPON THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS 77-81 (1974) [hereinafter cited as INDIAN COURT JUDGES].

11. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677.

12. WASH. CONST. art. 26.

13. *Comenout v. Burdman*, 84 Wn. 2d 192, 525 P.2d 217 (1974); *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744 (1974), *appeal dismissed*, 420 U.S. 915 (1975) (want of a

In April 1977 a Ninth Circuit panel in *Yakima II*¹⁵ ruled that R.C.W. ch. 37.12 violates the equal protection clause of the fourteenth amendment. The Supreme Court, in accepting review,¹⁶ has instructed the parties to prepare briefs on both the equal protection challenge and the issue of Washington's compliance with PL-280.¹⁷ Several Washington tribes have contended that R.C.W. ch. 37.12 fails to comply with PL-280 because (1) Washington failed to amend its constitution in order to remove a disclaimer of jurisdiction on Indian lands¹⁸ and (2) PL-280 does not permit the assumption of partial jurisdiction by a state.¹⁹ In addressing these compliance issues, the Court will have the opportunity to settle much of the debate that has continued for two decades surrounding the requirements of PL-280.²⁰ The decision will have immediate impact on Washington's twenty-three tribes and the counties where their reservations are located. It will also have implications for seven other states with similar constitutional disclaimers of jurisdiction.²¹ This comment will analyze first

substantial federal question); *Makah Indian Tribe v. State*, 76 Wn. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970); *State v. Bertrand*, 61 Wn. 2d 333, 378 P.2d 427 (1963); *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959).

14. *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

15. 552 F.2d 1332 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

16. *Prob. juris. noted*, 98 S. Ct. 1447 (1978) (No. 77-388).

17. Plaintiff Yakima Tribe challenged R.C.W. ch. 37.12 on the noncompliance issues and on equal protection, due process, and vagueness grounds. The due process and void for vagueness issues are beyond the scope of this comment.

18. WASH. CONST. art. 26, §2.

19. Congress amended PL-280 in 1968 to allow for the assumption of partial jurisdiction. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 401-406, 82 Stat. 78. See notes 86-90 and accompanying text *infra* for a discussion of the effects of the 1968 amendments to PL-280. R.C.W. ch. 37.12 was last amended in 1963, however, and thus comes under the 1953 version of PL-280. Unless otherwise noted, PL-280 refers to the 1953 law.

20. For an illustration of the state of the law, compare *Makah Indian Tribe v. State*, 76 Wn. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970) (partial jurisdiction allowed by PL-280) with *In re Hankins' Petition*, 80 S.D. 435, 125 N.W.2d 839 (1964) (PL-280 does not permit South Dakota to assume jurisdiction only on reservation highways); compare *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955) (consent of the people of the state required for disclaimer state to assume jurisdiction under a federal grant of concurrent state jurisdiction, Act of May 31, 1946, 60 Stat. 229), with *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959) (act of the state legislature is sufficient under PL-280). See also Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Maze*, 18 ARIZ. L. REV. 503, 566 (1976); Goldberg, *supra* note 5, at 568-75; Comment, *Extent of Washington Criminal Jurisdiction Over Indians*, 33 WASH. L. REV. 289 (1958).

21. See note 5 *supra*. The disclaimer states are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Alaska has a similar provision in its state constitution and Enabling Act, but Congress has included it within

the two compliance issues and then the equal protection challenge.²²

I. REPEAL OF STATE CONSTITUTIONAL DISCLAIMER OF JURISDICTION OVER INDIAN LANDS

Article 26 of the Washington Constitution states in pertinent part, "The following ordinance shall be irrevocable without the consent of the United States and the people of this state: . . . Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States" ²³ This disclaimer of jurisdiction mirrors a provision of the Enabling Act²⁴ admitting Washington to the Union. Congress included section 6 of PL-280²⁵ in recognition of the barrier these disclaimers posed to the assumption of criminal and civil jurisdiction over Indian lands by those states with provisions such as article 26 in their state constitutions. Section 6 gives the consent of Congress for people of any disclaimer state to "amend, where necessary, their State constitution . . . to remove any legal impediment to the assumption of civil and criminal jurisdiction,"²⁶ but stipulates that such an assumption of jurisdiction will not become effective "until the people . . . have appropriately amended their State constitution."²⁷

Although the plain language of the Enabling Act, the state constitution, and section 6 of PL-280 appears to require disclaimer states either to amend their constitutions or to submit the revocation of the disclaimer to a vote of the people,²⁸ the Washington Legislature en-

the group of mandatory states. 18 U.S.C. § 1162 (1976) (amendment originally enacted as Act of Nov. 25, 1970, 84 Stat. 1358).

22. The primary focus of this comment is on R.C.W. §§ 37.12.010-.070. The analysis is also applicable to option states in general and other disclaimer states in particular.

23. WASH. CONST. art. 26.

24. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The language of all the disclaimer state enabling acts is virtually identical to that of 25 Stat. 676, which admitted Washington, Montana, North Dakota, and South Dakota to the Union: "Said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Id.* at 677. The other acts are Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Okla.); Act of June 20, 1910, ch. 310, 36 Stat. 557 (Ariz. and N.M.).

25. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 6, 67 Stat. 590.

26. *Id.*

27. *Id.*

28. Arguably the requirement for "consent of the people" under the state constitution, *see* text accompanying note 23 *supra*, would be satisfied by a referendum or initiative. This would avoid the two-thirds vote in the state legislature required in Washington to amend the constitution. WASH. CONST. art. 23, § 1.

acted R.C.W. ch. 37.12, ignoring article 26 of the state constitution.²⁹ Attacks on the statute have been two-pronged: (1) that failure to amend the state constitution leaves R.C.W. ch. 37.12 in violation of the state constitution and the Enabling Act and (2) that regardless of the validity of R.C.W. ch. 37.12 under the state constitution, the statute does not comply with PL-280.

A. Validity of R.C.W. ch. 37.12 Under State Law

The Washington Supreme Court has developed two bases for upholding R.C.W. ch. 37.12 despite failure to amend article 26 of the state constitution. The court held, first, that the "consent of the people of this state" in article 26 requires only legislative action³⁰ and, more recently, that the disclaimer limits only state interference with Indian proprietary rights and taxation of Indian lands and does not affect general criminal and civil jurisdiction.³¹ The early cases, starting with *State v. Paul*,³² relied solely on the former rationale.³³ This rationale was derived, with very little commentary, from *Boeing Aircraft Co. v. Reconstruction Finance Corp.*,³⁴ a case involving another clause in article 26 disclaiming state power to tax federal lands. The court in *Boeing* reasoned that, because neither the referendum nor the initiative processes existed in Washington in 1889 when the state constitution and the Enabling Act were drafted, "consent of the people of

29. See Comment, *Extent of Washington Criminal Jurisdiction Over Indians*, 33 WASH. L. REV. 289 (1958) (predicting that R.C.W. ch. 37.12 would be held unconstitutional for failure to amend the disclaimer).

30. *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959).

31. *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744 (1974), *appeal dismissed*, 420 U.S. 915 (1975).

32. 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959).

33. See, e.g., *Makah Indian Tribe v. State*, 76 Wn. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970); *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959).

34. 25 Wn. 2d 652, 171 P.2d 838 (1946), *cert. denied*, 330 U.S. 803 (1947). *Boeing* involved the Federal Reconstruction Finance Act, ch. 8, 47 Stat. 5 (1932) (repealed 1953), under which Congress specified that property purchased by the Reconstruction Finance Corporation [hereinafter RFC] would be subject to state and local taxes. Pursuant to this congressional legislation, the Washington legislature enacted legislation to permit taxation of RFC property. WASH. REV. CODE § 84.40.315 (1976). *Boeing Aircraft Corporation* challenged an attempt to tax property it had leased from RFC for failure to amend a disclaimer over taxation of federal property contained in article 26.

The Washington Supreme Court held the taxation was valid. Shortly thereafter the voters of Washington approved a referendum expressly permitting state taxation of federal land to the extent permitted by Congress. WASH. CONST. amend. 19 (approved November 1946).

this state" under article 26 should be interpreted to mean a vote of the state legislature.³⁵

In its most recent consideration of the issue in *Tonasket v. State*,³⁶ the Washington Supreme Court developed a second rationale to sustain the validity of ch. 37.12. The court concluded that the Enabling Act and article 26 were primarily "concerned with protecting, from state proprietary interference, the title to and the taxation of Indian lands."³⁷ Thus, according to the *Tonasket* court, neither article

35. 25 Wn. 2d at 659, 171 P.2d at 843. The court eschewed the more logical conclusion that the lack of the referendum and initiative procedures should imply that an amendment to the constitution was required. In addition to the deficiencies of logic in *Boeing*, the court's analysis is of questionable validity in an Indian jurisdiction case because of different rules of construction.

Tax immunity legislation is strictly construed. See *Hale v. State Board*, 302 U.S. 95, 103 (1937); *Railroad Co. v. Loftin*, 105 U.S. 258, 261 (1881); *Boeing v. Reconstruction Fin. Corp.*, 25 Wn. 2d 652, 655, 171 P.2d 838, 840 (1946). On the other hand, congressional legislation involving Indians, such as PL-280, is to be liberally construed for the benefit of Indians. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Cf. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (a fiduciary relationship exists between the federal government and the treaty tribes). Also, whereas PL-280 expressly requires a disclaimer state to amend the state constitution, Act of Aug. 15, 1953, Pub. L. No. 83-280, § 6, 67 Stat. 590, the statute in *Boeing*, 47 Stat. 5 (1932) (repealed 1953), stipulated that any real property owned by RFC would be subject to state and local property taxes and required no constitutional amendment.

There are additional reasons why *Boeing* is a poor case on which to rely in an Indian jurisdiction case. First, article 26 and the Enabling Act provide little support for the *Boeing* court's interpretation of "consent of the people." The court's reading fails to give meaning to those words because any tax (or assumption of jurisdiction) would necessarily require an act of the legislature. Second, when Congress referred in the Enabling Act to legislative acts, the language used was "on behalf of the people" as contrasted with "consent of the people." Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. Third, the subject matter of article 26, including as it does guarantees of religious freedom and public education, makes an interpretation giving the legislature a special amending power questionable. See WASH. CONST. art. 23, § 1. Finally, the court in *Boeing* relied more heavily on an alternate analysis. The "consent of the people" interpretation was not necessary to the outcome. 25 Wn. 2d at 660, 171 P.2d at 843 (disclaimer restated existing law at the time of adoption but did not preclude future legislative action).

36. 84 Wn. 2d 164, 525 P.2d 744 (1974), *appeal dismissed*, 420 U.S. 915 (1975). *Tonasket* relied alternatively on the *Boeing* analysis. *Id.* at 178-79, 525 P.2d at 753 (1974).

In its first hearing of the case, the court accepted the validity of R.C.W. ch. 37.12 under article 26 with no discussion other than a citation of the following: *Makah Indian Tribe v. State*, 76 Wn. 2d 485, 457 P.2d 590 (1969); *State v. Bertrand*, 61 Wn. 2d 333, 378 P.2d 427 (1963); *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959), 79 Wn. 2d 607, 609, 488 P.2d 281, 283 (1971). The Supreme Court vacated this decision on other grounds. 411 U.S. 451 (1973). See note 51 *infra*.

37. 84 Wn. 2d at 177, 525 P.2d at 752. "Nowhere in these disclaimer provisions is the purely governmental function of state criminal and civil regulations either alluded to or expressly forbidden." *Id.* at 177, 525 P.2d at 752. The court is not entirely accurate. The constitutional language that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States," WASH. CONST. art. 26, § 2, can hardly be said not to allude to state criminal and civil jurisdiction.

26 nor the Enabling Act precluded state assumption of criminal and civil jurisdiction on Indian lands and there was, therefore, no need to amend article 26.³⁸ The court cited little authority to support this interpretation of article 26.³⁹ In fact, the more likely purpose of the disclaimers was to protect Indian populations from hostile homesteaders and settlers and not simply to protect Indian property rights.⁴⁰

Despite the Washington Supreme Court's inadequate analysis of article 26, its holding that R.C.W. ch. 37.12 is valid under state law is probably not reviewable in federal court.⁴¹ However, the integrity of Washington law could be enhanced by a closer observance of the mandate of article 26. Certainly, if the pending Supreme Court review of the Ninth Circuit decisions in *Yakima I* and *Yakima II*⁴² necessitates a revamping of R.C.W. ch. 37.12, consideration should also be given to amending the state constitution or at least submitting the question of assuming PL-280 jurisdiction to the voters via a referendum.

B. Validity of R.C.W. ch. 37.12 Under Section 6 of PL-280

Section 6 of PL-280 states in relevant part that "the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any [disclaimer] State until the people thereof have appropriately amended their State constitution or statutes as the case may be."⁴³ The issue of whether Washington's failure to amend article 26 complies with section 6 of PL-280 was first litigated in the 1966

38. 84 Wn. 2d at 177, 525 P.2d at 752. According to the court the lack of state jurisdiction on Indian reservations was due to federal preemption and not due to either article 26 or the enabling Act. *Id.* at 177, 525 P.2d at 752.

39. The court seems to rely on dictum in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). 84 Wn. 2d at 178, 525 P.2d at 753. For an extensive criticism of such reliance on *Kake*, see Goldberg, *supra* note 5, at 571.

40. See Goldberg, *supra* note 5, at 570. Disclaimers were inserted into the statehood acts and state constitutions of those states admitted to the Union after the Supreme Court held in *United States v. McBratney*, 104 U.S. 621 (1882), that the Colorado Statehood Act repealed jurisdiction disclaimers over Indian lands contained in territorial legislation. The Court held that Colorado was therefore limited in its jurisdiction over Indian lands only to the extent existing treaties and federal Indian legislation preempted state jurisdiction.

41. *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 657 (9th Cir. 1966). *But see* *Tonasket v. State*, 84 Wn. 2d at 190, 525 P.2d at 760 (Utter, J., dissenting). Justice Utter argues that because article 26 was inserted into the state constitution by mandate of Congress as a condition precedent to statehood, federal law should control. *Id.*

42. *Prob. juris. noted*, 98 S. Ct. 1447 (1978) (No. 77-388).

43. Act. of Aug. 15, 1953, Pub. L. No. 83-280, § 6, 67 Stat. 590.

case of *Quinault Tribe of Indians v. Gallagher*,⁴⁴ in which the Ninth Circuit ruled that section 6 evinced congressional intent that state removal of jurisdictional disclaimers over Indian land be valid under state law. Accordingly, the *Quinault* court felt bound by the Washington Supreme Court holding that the "consent of the people" had been properly evidenced by legislative enactment of R.C.W. ch. 37.12.⁴⁵ When the compliance of R.C.W. ch. 37.12 with section 6 of PL-280 was first challenged in the state courts, the Washington Supreme Court adopted the *Quinault* interpretation in *Makah Tribe of Indians v. State*.⁴⁶

The soundness of the *Quinault* reasoning is questionable in light of two subsequent United States Supreme Court decisions emphasizing the necessity for strict compliance with the procedural requirements of PL-280. In *Kennerly v. District Court*,⁴⁷ the Supreme Court invalidated an attempt by Montana, another disclaimer state, to exercise civil jurisdiction over an Indian on the Blackfeet Reservation. The Blackfeet Tribal Council had passed a resolution purporting to establish concurrent state and tribal jurisdiction over civil matters on the Blackfeet Reservation. The Court held that Congress had established the conditions by which a state might acquire jurisdiction on Indian reservations and that a tribal ordinance granting the state jurisdiction was not a substitute for compliance with the conditions of PL-280.⁴⁸

44. 368 F.2d 655 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

45. *Id.* at 656-57 (citing *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959)). This analysis does not withstand examination. The legislative history indicates that § 6 was considered at some length. See Goldberg, *supra* note 5, at 572; H. R. REP. NO. 848, 83d Cong. 1st Sess., 6, 7, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 2409-14; 99 CONG. REC. 10782 (1953). Congress wanted to assure that any state assumption of jurisdiction would be valid under both state law and the enabling acts. Congress may require more than minimal assurances of the validity of state assumption of jurisdiction over Indians. Compliance with § 6 would remove all doubt about the effect of the jurisdiction disclaimers in either the enabling acts or the state constitutions. Failure to comply with the conditions of § 6 has led to inconsistent results. Compare *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955) (consent of the people of the state required for disclaimer state to assume jurisdiction pursuant to federal statute granting concurrent state jurisdiction, Act of May 31, 1946, 60 Stat. 299), with *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959) (act of the state legislature is sufficient).

46. 76 Wn. 2d 485, 490-91, 457 P.2d 590, 593-94 (1969), *appeal dismissed*, 397 U.S. 316 (1970). The previous litigation of R.C.W. ch. 37.12 in the Washington courts had involved only the issue of compliance with article 26 of the state constitution. See *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33, *appeal dismissed*, 361 U.S. 898 (1959).

47. 400 U.S. 423 (1971).

48. *Id.* at 427. The council's action was taken prior to the 1968 amendments to PL-280, Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401-406, 82 Stat. 78, requiring the consent of a tribe to the state assumption of jurisdiction over Indian lands. The Su-

In *McClanahan v. State Tax Commission*,⁴⁹ the Supreme Court held that Arizona could not tax income earned by a Navajo Indian from reservation sources, because Arizona had not taken the steps required by PL-280, namely amending its state constitutional disclaimer of jurisdiction and acquiring tribal consent. "Simple legislative enactment," here a tax law, was not enough.⁵⁰ The clear implication of *Kennerly* and *McClanahan* is that the Court will require strict compliance with the conditions of PL-280 in order for a state to acquire jurisdiction on Indian lands.

The Washington Supreme Court was asked to consider whether R.C.W. ch. 37.12 complied with PL-280 in light of *McClanahan* and *Kennerly* in *Tonasket v. State*.⁵¹ The court looked to the clause of section 6 that says states shall amend their constitutions "where necessary" to remove legal impediments to assumption of jurisdiction⁵² and decided that the necessity of an amendment was a question of state law that had been resolved in Washington.⁵³ The "where necessary" language, however, admits of another interpretation. It could have been included in the recognition that some disclaimer states have statutes, in addition to constitutional provisions, disclaiming jurisdiction on Indian land. Repealing such statutes would not require constitutional amendment.⁵⁴

preme Court held, however, that the council's actions would not have been sufficient even under the 1968 law because the 1968 law required a vote of the tribal members to give consent. 400 U.S. at 429.

49. 411 U.S. 164 (1973).

50. "[W]e cannot believe that Congress would have required . . . the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment." *Id.* at 178.

51. 84 Wn. 2d 164, 525 P.2d 744 (1974), *appeal dismissed*, 420 U.S. 915 (1975). The Supreme Court vacated an earlier Washington Supreme Court decision in *Tonasket* and remanded with instructions to reconsider in light of *Kennerly* and *McClanahan*. 79 Wn. 2d 607, 488 P.2d 281 (1971), *vacated*, 411 U.S. 451 (1973).

52. The entire section reads,

Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, *where necessary*, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Act of Aug. 15, 1953, Pub. L. No. 83-280, § 6, 67 Stat. 590 (first emphasis added).

53. 84 Wn. 2d 164, 178-79, 525 P.2d 744, 753 (1974).

54. See Goldberg, *supra* note 5, at 573 n.176. Also, the South Dakota Constitution has a specific provision allowing for a constitutional amendment of the type required by

In summary, the express terms and legislative history of PL-280 condition congressional permission for disclaimer state assumption of jurisdiction on Indian land upon amendment of the disclaimer clause in the state constitution. The holding of *Quinault* and *Makah* that R.C.W. ch. 37.12 is valid because it fulfills congressional intent, if not the plain language of PL-280, is questionable in light of *Kennerly* and *McClanahan*. As a matter of state law, the Washington Supreme Court continues to hold to its superficial analysis in *Boeing*. The court's alternate explanation that article 26 refers only to state infringement of proprietary rights is not supported by convincing authority.

II. PARTIAL JURISDICTION UNDER PL-280

Courts have tended to address the issue of partial jurisdiction under PL-280 as a single question: whether PL-280 does or does not permit partial jurisdiction.⁵⁵ Thus, courts have construed evidence that Congress intended to permit some partial state jurisdiction to imply that PL-280 permits any partial jurisdiction scheme.⁵⁶ The label "partial jurisdiction" is broad enough to encompass a large number of schemes, some rational, some eccentric. Although the requirements of due process and equal protection⁵⁷ provide some protection from the more whimsical possibilities, a more differentiated analysis would better serve the purposes of Congress and the needs of Indians.

Professor Carole Goldberg has identified three categories of partial jurisdiction that are useful in analyzing state PL-280 statutes.⁵⁸ The first category is jurisdiction on fewer than all Indian reservations

PL-280 by a vote of the state legislature. S.D. CONST. art. XVI. Article 26 of the Washington Constitution, titled, Compact with the United States, also begins, "The following ordinance shall be irrevocable." WASH. CONST. art. 26 (emphasis added). It is however a constituent part of the state constitution and the language of article 26 indicates that at a minimum the "consent . . . of the people of [the] state" is needed to revoke it. See notes 23, 28, & 35 and accompanying text *supra*.

55. *Yakima I*, 550 F.2d 443 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978). See *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 657-58 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967); *Makah Indian Tribe v. State*, 76 Wn. 2d 485, 491-92, 457 P.2d 590, 594 (1969), *appeal dismissed*, 397 U.S. 316 (1970).

56. See *Yakima I*, 550 F.2d 443, 448 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978). But see *In re Hankins' Petition*, 80 S.D. 435, 125 N.W.2d 839, 842-43 (1964) (South Dakota could not assume jurisdiction only over highways).

57. See *Yakima II*, 552 F.2d 1332 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978). See Part III *infra*.

58. See Goldberg, *supra* note 5, at 548-49, 552-58.

within a state (unit reservation jurisdiction).⁵⁹ The second category is jurisdiction over selected subject matters (partial subject matter jurisdiction).⁶⁰ The final category is jurisdiction on selected lands within a reservation while excluding other lands within the same reservation (title-based jurisdiction).⁶¹ R.C.W. ch. 37.12 has elements of all three categories,⁶² which will be analyzed separately.

A. Unit Reservation Jurisdiction

PL-280 was enacted in 1953 to serve three primary purposes: to facilitate the assimilation of Indians into American society,⁶³ to solve a law enforcement crisis existing on many reservations at that time,⁶⁴ and to reduce the cost of government wardship over Indians.⁶⁵ Congress, however, provided no means by which a state might fund the costs of additional jurisdiction.⁶⁶ For states with large Indian populations, the assumption of complete PL-280 jurisdiction would involve considerable expense. Permitting unit reservation jurisdiction would allow states to allocate budget resources and assume jurisdiction on those reservations with the most severe law enforcement problems. To the extent that the unit reservation jurisdiction option encourages

59. Montana currently has this type of jurisdiction. MONT. REV. CODES ANN. § 83-801 (1966) (assuming criminal jurisdiction on the Flathead Indian Reservation). Washington has unit reservation jurisdiction to the extent it assumes full jurisdiction only on those reservations where the tribe so requests. WASH. REV. CODE §§ 37.12.010-.021 (1976). Idaho also assumes full jurisdiction—but concurrently—if a tribe consents and jurisdiction over seven subject matters if not. IDAHO CODE §§ 67-5101, 5102 (1973).

60. In Washington the state assumes jurisdiction over eight subject matters on the fee land of non-consenting reservations. See note 9 *supra*. Idaho assumes jurisdiction over seven subject matters on both fee and non-fee lands unless the tribe consents to full PL-280 jurisdiction (but concurrently). IDAHO CODE §§ 67-5101, 5102 (1973).

61. The State of Washington assumes full jurisdiction over all fee land on nonconsenting reservations. WASH. REV. CODE § 37.12.010 (1976). Under a related scheme, North Dakota assumes civil jurisdiction over individual consenting Indians. N.D. CENT. CODE §§ 27-19-01, 05-06 (1974).

62. See notes 59-61 *supra*.

63. SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, BACKGROUND REPORT ON PUBLIC LAW 280, 1-2, 8-11 (1975) [hereinafter BACKGROUND REPORT]. Following World War II and lasting until the early sixties, the dominant policy of the federal government toward Indians was one aimed at Indian assimilation into the mainstream of American society. See *id.*; U.S. DEPT OF THE INTERIOR, FEDERAL INDIAN LAW 260-62 (1958).

64. Allowing states to assume civil jurisdiction as well as criminal jurisdiction appears to have been an afterthought. See Goldberg, *supra* note 5, at 540-43.

65. See *id.*

66. PL-280 maintains the tax exempt status of Indian property, both real and personal. 28 U.S.C. § 1360 (1976). Thus, a state assuming PL-280 jurisdiction would not have tax revenue from the additional lands over which it was acquiring jurisdiction.

states to assume jurisdiction, the objectives of PL-280 would be served.⁶⁷

Although PL-280 in its original form⁶⁸ made no express mention of partial jurisdiction, Congress had utilized unit reservation jurisdiction prior to the enactment of PL-280.⁶⁹ In addition, PL-280 excludes three reservations⁷⁰ located in mandatory states.⁷¹ The rationale for the exemption—the existence of a viable tribal law enforcement program on those reservations⁷²—applies equally to non-mandatory states.

Because Congress provides no means by which states can fund the additional burden of PL-280 jurisdiction, it seems reasonable that states be allowed to assume jurisdiction selectively where it is most crucial and in a manner consistent with the states' financial abilities.

B. Partial Subject Matter Jurisdiction⁷³

67. After the 1968 amendments to PL-280, tribal consent is required for a state to assert any jurisdiction on a reservation. 25 U.S.C. §§ 1321, 1322, 1326 (1976). Although unit reservation jurisdiction imposed against the will of the tribe prior to 1968 may be objectionable, such objections would be political rather than legal because the 1953 form of PL-280 did not require such consent.

68. See note 19 *supra* and notes 86–90 and accompanying text *infra* (effects of the 1968 amendment).

69. See, e.g., Act of Oct. 5, 1949, Pub. L. No. 81–322, 63 Stat. 705 (California given civil and criminal jurisdiction over the Agua Caliente Indian Reservation); Act of June 30, 1948, Pub. L. No. 80–846, 62 Stat. 1161 (Iowa given criminal jurisdiction over the Sac and Fox Reservation); Act of May 31, 1946, Pub. L. No. 79–394, 60 Stat. 229 (North Dakota given criminal jurisdiction on the Devil's Lake Reservation).

70. The excluded reservations are the Red Lake Reservation in Minnesota, the Warm Springs Reservation in Oregon, and the Menominee Reservation in Wisconsin. Act of Aug. 15, 1953, Pub. L. No. 83–280, §§ 2, 4, 67 Stat. 588. Since 1953 Congress has brought the Menominee back within PL-280, Act of Aug. 24, 1954, Pub. L. No. 83–661, 68 Stat. 795, and returned criminal jurisdiction to the Metlakatla Indian Community in Alaska, Act of Nov. 25, 1970, Pub. L. No. 91–523, 84 Stat. 1358, which was excluded when Alaska was added to the group of mandatory states in 1958. See note 5 *supra*.

71. See note 5 *supra*.

72. See *Bryan v. Itasca County*, 426 U.S. 373, 385–86 (1976); H.R. REP. NO. 848, 83rd Cong., 1st Sess. 7, reprinted in [1953] U.S. CODE CONG. & AD. NEWS 2409–14.

73. Because the Washington jurisdiction scheme deals with both civil and criminal jurisdiction, this comment will not deal with a special case of partial subject matter jurisdiction in which a state attempts to assume either criminal or civil jurisdiction alone. E.g., MONT. REV. CODES ANN. § 83-801 (1966) (assuming only criminal jurisdiction on the Flathead Reservation). An analysis of the legislative history and the statutory language of PL-280 yields as much support for assumption of either criminal or civil jurisdiction as there is for unit reservation jurisdiction. Congress has authorized the assumption of only criminal jurisdiction in the past. E.g., Act of June 8, 1940, Pub. L. No. 76-565, 54 Stat. 249 (Congress granting Kansas criminal jurisdiction over all reservations within the state). See BACKGROUND REPORT, *supra* note 63, at 6. PL-280 treats the assumption of criminal and civil jurisdiction separately in different sections. 18

Both the legislative history and the statutory language⁷⁴ of PL-280 are ambiguous as to the validity of partial subject matter jurisdiction.⁷⁵ Section 6,⁷⁶ setting forth the conditions for disclaimer states, makes no mention of partial jurisdiction, although compliance with its requirement to remove constitutional barriers would presumably leave the state with full jurisdiction.⁷⁷ Section 7, which was repealed in 1968,⁷⁸ set forth the conditions for nonmandatory states without constitutional disclaimers.⁷⁹ The language of Section 7 is cited by both the tribes and the state to support their positions. Depending upon which clause is stressed, the language of section 7 could be read as giving states wide discretion as to the jurisdiction scheme adopted or, alternately, as requiring a state to adopt the same measure of civil and criminal jurisdiction as is granted to mandatory states.⁸⁰

The purposes of PL-280⁸¹ would be furthered by limiting the jurisdictional freedom of the state. The only statutory purpose served by

U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976). Although the separation into distinct sections might have been motivated in part to aid codification in the criminal and civil titles of the U.S. Code, there are some differences in language in the two sections (for example, only in § 4, which grants mandatory states civil jurisdiction, does it stipulate that tribal ordinances and customs are to be given full force and effect to the extent not inconsistent with state law).

74. See Goldberg, *supra* note 5, at 555.

75. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 6-7, 67 Stat. 588.

76. See note 52 *supra*.

77. Section 6 has been interpreted as providing the only conditions for disclaimer states to assume jurisdiction, namely the removal of the disclaimers from the state constitution. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 6, 67 Stat. 590. See *In re Hankins' Petition*, 125 N.W.2d 839, 841 (S.D. 1964); H.R. REP. NO. 848, 83rd Cong., 1st Sess. 2, reprinted in [1953] U.S. CODE CONG. & AD. NEWS 2409-14. Alternately, § 6 can be interpreted as a condition that, once satisfied, simply leaves disclaimer states in the same position as other non-mandatory states. Thus, prior to 1968 disclaimer states would still have had to comply with § 7, which required affirmative legislation binding states to assume jurisdiction on Indian lands. In fact most disclaimer states complied only with § 7 and ignored § 6. See INDIAN COURT JUDGES, *supra* note 10, at 89-94. The 1968 amendment clarifies this situation. It repeals § 7, makes the consent of the affected Indian tribe necessary to assume jurisdiction, and then restates the § 6 stipulation for disclaimer states. 25 U.S.C. §§ 1321, 1322, 1324, 1326 (1976).

78. See note 77 *supra*.

79. See notes 5, 77, *supra*.

80. Section 7 stated,

The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588 (emphasis added). The position for partial subject matter jurisdiction is that "in such manner" gives the state complete freedom. Those opposed to partial subject matter contend that "as provided for in this Act" means the same jurisdiction granted mandatory states in §§ 2 and 4 of the Act.

81. See notes 63-65 and accompanying text *supra*.

allowing states complete freedom to assume partial subject matter jurisdiction is that of assimilation, an objective in conflict with the present congressional policy of Indian self-determination.⁸² The remaining purposes of PL-280 are either hampered or threatened by granting partial subject matter jurisdiction to the state. Such schemes tend to complicate rather than improve law enforcement because of the complexities inherent in the coordination of state, federal, and tribal criminal jurisdiction on an Indian reservation.⁸³ Also, allowing partial subject matter jurisdiction potentially increases, rather than decreases, the cost to the federal government of law enforcement, because a state could conceivably assume jurisdiction only over areas that create revenue.⁸⁴

Subsequent legislative enactment may be relevant to the correct interpretation of PL-280.⁸⁵ In 1968 Congress repealed section 7 and substituted sections 401 and 402 of the Indian Civil Rights Act.⁸⁶ The new sections, which apply only to state enactments after 1968, specif-

82. The 1968 Civil Rights Act, Pub. L. No. 90-284, §§ 401-406, 82 Stat. 78, which amended PL-280, reflects a shift in federal Indian policy since 1953 from one of assimilation to one encouraging Indian self-determination. President's Special Message on Indian Affairs, PUB. PAPERS 564-67, 575-76 (1970); President's Message to Congress, *Forgotten Americans*, 114 CONG. REC. 5394 (1968); BACKGROUND REPORT, *supra* note 63, at 2. It is appropriate to interpret PL-280 in light of current policy. See Bryan v. Itasca County, 426 U.S. 373, 385-86 (1976).

Historically, federal Indian policy has shifted several times between promoting assimilation and promoting self-determination. Assimilation is anathema to Indians. See BACKGROUND REPORT, *supra* note 63, at frontpiece (memorandum of the chairman). The first period of assimilation policy was initiated by the General Allotment Act of 1887, 24 Stat. 388 (Dawes Act), and resulted in a reduction in Indian land holdings in the United States from 138,000,000 acres in 1887 to 48,000,000 acres in 1934, when the Act was repealed. See generally W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS—REPORT OF THE COMM'N ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN* 17-32 (1966).

83. In those areas of criminal jurisdiction not assumed by the state, the tribe retains jurisdiction over most remaining crimes if both victim and defendant are Indian. 18 U.S.C. § 1152 (1976). The federal government has jurisdiction, if the state has not assumed it, over any Indian committing one of ten major crimes (murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, robbery, incest, and assault with a dangerous weapon), *id.* § 1153, and over any crime where only one party, either victim or defendant, is an Indian, *id.* § 1152. If the crime is one of the ten major crimes, federal law is applied. For most other crimes falling under federal jurisdiction, state law is applied in federal courts. *Id.* § 13. See note 98 *infra*.

84. See Goldberg, *supra* note 5, at 555. Cf. McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) (Arizona unsuccessfully attempted to impose state income tax on income earned on the Navajo Indian Reservation).

85. For instance, congressional refusal to terminate a reservation has been found to indicate an intent to preserve it. See *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 356-57 (1962).

86. 25 U.S.C. §§ 1321-1322 (1976).

ically allow partial jurisdiction of almost any variety,⁸⁷ but they also require prior tribal consent.⁸⁸ The requirement of tribal approval minimizes the possibility of negative effects of partial jurisdiction assumed after 1968 by imposing a check on arbitrary state action.⁸⁹ For example, Indian tribes can now veto any jurisdictional scheme designed as a revenue source for the state or likely to complicate law enforcement on the reservation.

Although proponents of partial subject matter jurisdiction argue that the 1968 amendment merely made explicit an option which was implicit in the 1953 Act,⁹⁰ the better view is that this partial jurisdiction option was provided in order to promote Indian self-determination.⁹¹ Tribes could thereby bargain for a format of state jurisdiction that would best meet their needs.

In summary, it is unclear whether Congress intended to permit assumption of partial subject matter jurisdiction when it enacted PL-280. Given that ambiguity, the Act should be construed to implement most effectively its purposes and present federal Indian policy, as well as serve the interests of Indians, for whose benefit the statute ostensibly was enacted.⁹² Such a construction would invalidate most state partial subject matter jurisdiction statutes enacted prior to 1968.⁹³

C. *Title-Based Partial Jurisdiction*

The legislative intent and statutory purpose analysis discussed for partial subject matter jurisdiction is also applicable to title-based jurisdiction. However, the confusion and inefficiency of title-based jurisdiction are perhaps more severe. Under partial subject matter jurisdiction the responsibility of each law enforcement body is clear in any

87. "The consent of the United States is hereby given to any State . . . to assume . . . such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State." *Id.* § 1321(a). Section 1322(a) has a similar provision for civil matters.

88. *Id.* § 1326.

89. Section 403 added a provision permitting retrocession of state jurisdiction in case a scheme proves unworkable. *Id.* § 403, 82 Stat. at 79.

90. See Goldberg, *supra* note 5, at 555.

91. See note 82 *supra*.

92. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *United States v. Kagame*, 118 U.S. 375, 383-84 (1886).

93. The states affected would be (1) Washington, WASH. REV. CODE § 37.12.010 (1976) (eight subject matters); (2) Arizona, ARIZ. REV. STAT. §§ 36-1801, 1865 (1974) (air and water pollution); (3) Idaho, IDAHO CODE § 67-5101 (1973).

given situation.⁹⁴ Under the title-based system, however, a police officer's authority is contingent upon title to the land on which a crime or accident occurs. Theoretically, a title search would be necessary in each instance.⁹⁵ In Washington fee land is subject to full state PL-280 jurisdiction, whereas non-fee or trust land is subject to state jurisdiction in only eight subject matters.⁹⁶ This combination of title-based and partial subject matter jurisdiction adds to the complexities.⁹⁷

In contrast to unit reservation jurisdiction or partial subject matter jurisdiction, for which support can be found in prior congressional actions, a cogent argument can be made that Congress did not intend to permit title-based jurisdiction. In 1948 Congress passed a statute defining "Indian country" to clarify when the federal government has criminal jurisdiction over Indians and Indian lands.⁹⁸ The statute clearly states that "Indian country" includes "all land within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent."⁹⁹ This legislation resolved a controversy as to the limits of state and federal criminal jurisdiction on Indian lands.¹⁰⁰ The purpose of the statute was to avoid "an impractical pattern of checkerboard jurisdiction."¹⁰¹ It is highly unlikely that within five years Con-

94. See note 83 *supra*.

95. On some Washington reservations cross-deputization of federal, state, and tribal police officers has eased the confusion somewhat. See STATE OF WASHINGTON, COMPREHENSIVE PLAN FOR LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: JANUARY 1-DECEMBER 31, at 752 (1973).

96. See note 83 *supra*.

97. As an illustration, a disturbance involving Indian and non-Indian youths on non-fee land within the boundaries of a nonconsenting reservation could involve the following complexities: (1) all persons under 18 would be under state jurisdiction, WASH. REV. CODE § 37.12.010(5) (1976) (juvenile delinquency is one of the eight subject matters); (2) any non-Indian who assaulted another non-Indian would also be under state jurisdiction, COHEN, *supra* note 4 at 365; see *Draper v. United States*, 164 U.S. 240 (1896); (3) any non-Indian 18 or older who assaulted an Indian would be under federal jurisdiction, 18 U.S.C. §§ 13, 1152 (1976); (4) all Indians 18 or older would be under federal jurisdiction if they were charged with one of 10 crimes or if they assaulted a non-Indian, 18 U.S.C. §§ 1152, 1153 (1976); (5) any Indian 18 or older who neither assaulted a non-Indian nor committed one of the 10 crimes would be under tribal jurisdiction, 18 U.S.C. § 1152 (1976), see *Ex parte Crow Dog*, 109 U.S. 556 (1883).

98. Crimes and Criminal Procedure Act of 1948, Pub. L. No. 80-772, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1976)).

99. *Id.*

100. The statute codified the system of federal and state jurisdiction on Indian lands that had emerged from a long line of Supreme Court cases. See *United States v. McGowan*, 302 U.S. 535 (1937); *United States v. Celestine*, 215 U.S. 278 (1909); *Draper v. United States*, 164 U.S. 240 (1896); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. McBratney*, 104 U.S. 621 (1882).

101. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). The Court characterized checkerboard jurisdiction as the "confusion Congress specifically sought to avoid."

gress intended to recreate that same checkerboard pattern under PL-280. Indeed, given the impracticality of title-based jurisdiction,¹⁰² the courts should restrict partial jurisdiction under the 1968 amendment to PL-280 to partial subject matter jurisdiction and unit reservation jurisdiction.

D. Case Law

To date, most of the case law has supported partial jurisdiction schemes enacted under PL-280,¹⁰³ although sometimes on the basis of rather novel theories. The Washington statute, R.C.W. ch. 37.12, was first challenged as an unauthorized assumption of partial jurisdiction under PL-280 in *Quinault Tribe of Indians v. Gallagher*.¹⁰⁴ The court begged the question by characterizing R.C.W. ch. 37.12 as a total jurisdiction statute, with tribal consent as a condition precedent to the assumption of jurisdiction over "some matters" (all but the eight listed subject areas) "concerning some Indians" (those on non-fee land).¹⁰⁵

In light of the questionable analysis in the *Quinault* decision, the Ninth Circuit sua sponte decided to reconsider the partial jurisdiction issue in *Yakima I*.¹⁰⁶ Although *Quinault* was affirmed, the court abandoned the total jurisdiction fiction. Conceding that the checkerboard criminal jurisdiction created by Washington's title-based statute was troublesome, the court saw no way of invalidating, on a statutory

Id. Seymour was a habeas corpus proceeding brought by a member of the Colville Indian Tribe who had been convicted of burglary on fee land within the exterior boundaries of the Colville Indian Reservation. The Washington Supreme Court denied the writ. The United States Supreme Court reversed in an unanimous opinion written by Justice Black. One year later the Washington legislature enacted R.C.W. ch. 37.12, which created the very checkerboard jurisdiction that Congress had sought to avoid. See note 4 and accompanying text *supra*.

102. "[L]aw enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or the Federal Government." *Id.* at 358. See also *In re Hankins' Petition*, 80 S.D. 435, 125 N.W.2d 839, 842-43 (1964).

103. But see *In re Hankins' Petition*, 80 S.D. 435, 125 N.W.2d 839 (1964) (invalidating attempt by South Dakota to assume jurisdiction only on reservation highways).

104. 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967). Plaintiff tribe sought declaratory and injunctive relief to prevent the state from exercising jurisdiction on the Quinault Reservation. See notes 44-45 and accompanying text *supra* (discussion of the challenge to R.C.W. ch. 37.12 for failure to amend the state constitution).

105. 368 F.2d at 658. The substantive issue was whether Washington's scheme met the purposes and conditions of PL-280. It matters little whether a statute is characterized as a partial jurisdiction statute or as a full jurisdiction statute with conditions precedent. The result in either instance is a complex division of jurisdiction between three governmental bodies.

106. 550 F.2d 443 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

basis, that particular type of partial jurisdiction without invalidating all partial jurisdiction schemes.¹⁰⁷ The majority's decision was motivated primarily by the "unfortunate law enforcement problems for thousands of native Americans" that might arise if state jurisdiction were suddenly withdrawn.¹⁰⁸

The assumption in *Yakima I* that invalidation of partial jurisdiction schemes would lead to serious law enforcement problems is questionable.¹⁰⁹ The negative consequences of invalidation must be balanced against the costs of continuing the existing scheme, which in Washington results in a checkerboard of full and partial jurisdiction areas on some reservations. As indicated in the dissenting opinion in *Yakima I*, the majority exaggerated the effects of invalidation.¹¹⁰ Because law enforcement duties have always been shared by state, federal, and Indian officers, the necessary law enforcement agencies are already present. The only task would be to expand existing law enforcement services, a much more modest task than creating new law enforcement agencies. Furthermore, not all state jurisdiction need be affected. By distinguishing among the three types of partial jurisdiction, the court could have permitted unit reservation jurisdiction while invalidating partial subject matter and title-based jurisdiction. Such a holding would have reduced the number of states affected,¹¹¹ and also would have validated Washington's PL-280 jurisdiction assumed upon tribal consent prior to the 1963 amendments to R.C.W. ch. 37.12.¹¹²

107. 550 F.2d at 448.

108. *Id.* at 445. In light of such potentially negative consequences, the majority required a clear violation of PL-280: "Despite these consequences we would not hesitate to overrule *Quinault II* if it were plainly and unequivocally inconsistent with the applicable legislative history of PL-280." *Id.* at 446. The court admitted that the legislative history of PL-280 was ambiguous, but the court found that it provided "reasonable support" for the result in *Quinault II*. *Id.* at 448. Five of 12 judges dissented in an opinion by Judge Hufstедler. *Id.* at 449.

109. See 550 F.2d at 453-54 (dissenting opinion).

110. The trial court record substantiated a less than optimal law enforcement situation on the Yakima Reservation. *Id.* at 453 (dissenting opinion). Assuming arguendo that, had the court in *Yakima I* invalidated R.C.W. ch. 37.12, all state partial jurisdiction statutes enacted under PL-280 would be invalid, the effect on many of the "thousands of native Americans" referred to would be minimal. In Arizona, for example, this would invalidate only state air and water pollution statutes as applied to Indian reservations. ARIZ. REV. STAT. §§ 36-1801, 1865 (1974).

111. For example, Montana has a unit reservation jurisdictional scheme. MONT. REV. CODES ANN. § 83-801 (1966).

112. Prior to the 1963 amendments to R.C.W. ch. 37.12, several Washington tribes had requested and received full state PL-280 jurisdiction. States other than Washington that would be affected by invalidating partial subject matter and title-based jurisdiction are Idaho and Arizona. See note 93 *supra*.

In summary, the Ninth Circuit in *Yakima I* erred in not treating the partial jurisdiction question of PL-280 as three separate inquiries. Contrary to the *Yakima I* result, the weight of evidence as to congressional intent validates unit reservation jurisdiction but fails to support partial subject matter or title-based jurisdiction. Such an interpretation promotes the present public policy toward Indians, strikes down the inadequate state jurisdiction statutes, and causes only minimal disruption on Indian reservations in the eight disclaimer states.

III. EQUAL PROTECTION

The equal protection clause of the fourteenth amendment¹¹³ is a new variable in the problem of PL-280 jurisdiction.¹¹⁴ The principal question is whether the Court ought to apply the "strict scrutiny" standard,¹¹⁵ the "rational basis" standard,¹¹⁶ or some intermediate standard to test the validity of a jurisdictional scheme under PL-280.

A. *Strict Scrutiny of the PL-280 Statutes*

The *Yakima II* court in its equal protection analysis of R.C.W. § 37.12.010 found that "the classification based on fee and non-fee lands within reservations is not on its face racially discriminatory, and, as far as the record reveals, was not adopted to mask racial discrimination."¹¹⁷ The court reached this conclusion because "[b]oth Indians and non-Indians live on both fee and non-fee land within the

113. U.S. CONST. amend. XIV, § 1. The treatment of equal protection in the space of this comment cannot be exhaustive; rather, it is intended to suggest an outline of the major considerations applicable to the validity of PL-280 jurisdiction statutes.

114. The recent successful equal protection challenge to Washington's PL-280 statute demonstrates the importance of the issue. In that case, even the appellant tribe did not stress the equal protection argument in its brief. It chose instead to emphasize the compliance, the void-for-vagueness, and the due process issues. Brief for Appellant at 41-44, *Yakima II*, 552 F.2d 1332 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

115. When a statute is found to impinge on a fundamental right or is based on a suspect classification (race, national origin, or alienage) a court may require a state to show a necessary relation between the classification and a compelling state interest. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28, 33 (1973); Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

116. Absent the conditions requiring "strict scrutiny," a court may uphold a statute if it finds that it has a rational basis in the furtherance of some legitimate state interest. See, e.g., *McDonald v. Board of Elections*, 394 U.S. 802 (1968); *McGowan v. Maryland*, 366 U.S. 420 (1961).

117. 552 F.2d 1332, 1334 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

Yakima reservation."¹¹⁸ This conclusion cannot withstand a close reading of R.C.W. § 37.12.010. Although both Indians and non-Indians live on non-fee lands, the statute does not treat them equally. With respect to non-Indians, the state assumes full PL-280 jurisdiction, regardless of the status of land.¹¹⁹ It is only as to "*Indians* when on [non-fee lands] within an established Indian reservation"¹²⁰ that the state restricts jurisdiction to eight subject areas.¹²¹

Even if R.C.W. § 37.12.010 were neutral on its face,¹²² it could still be argued that, as applied, the statute purposely discriminates¹²³ on the basis of race.¹²⁴ That the state intended R.C.W. § 37.12.010 to

118. 552 F.2d at 1334-35.

119. Prior to 1963, when R.C.W. ch. 37.12 was amended, non-Indians on non-consenting reservations were under federal jurisdiction whenever Indians were involved. See note 83 and accompanying text *supra*.

120. WASH. REV. CODE § 37.12.010 (1976).

121. See note 9 *supra*.

122. Although R.C.W. § 37.12.010 seems clearly discriminatory on its face, it might be argued that, because all state PL-280 statutes are restricted in their application to Indian reservations, it is inevitable that such statutes will have a differential impact on Indians. Nevertheless, examining only the population of a nonconsenting reservation, the statute applies differently to Indians than to non-Indians.

123. If a statute is neutral on its face but challenged as discriminatory as applied, it must be shown that the statute has a discriminatory purpose. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

124. There is a line of cases that holds that the classification "Indian" is political rather than racial. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974). These cases involve federal statutes that single out Indians for special treatment. The political classification is based on

the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

Id. at 551-52. See U.S. CONST. art. I, § 8, cl. 3, art. II, § 2, cl. 2. As noted by the Court in *Mancari*, if these federal statutes were deemed invidious racial discrimination, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

States, however, do not enjoy the same unique relationship with Indians. There is no express constitutional power in states to deal with Indians. Moreover, there are no treaties signed between the tribes and a state, and, most importantly, there is no "guardian-ward" relationship or solemn commitment of states toward Indians. In the context of state legislation, therefore, there is no rational foundation for a "political" categorization of Indians. While it is true that membership in the class of "Indians" may depend upon membership in federally recognized tribes, *id.* at 553 n.24, and not solely on racial make-up, the class is both "discrete and insular," see *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), and "saddled with such disabilities, . . . subjected to a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (defining a suspect class). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1017-18 (1978).

have a differential effect on Indians is a conclusion buttressed by examining the considerations set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹²⁵ the impact of the legislation on Indians,¹²⁶ the historical background and particular sequence of events culminating in the legislation,¹²⁷ and the legislative

125. 429 U.S. 252, 266-68 (1977). At trial, due to a partial summary judgment for the state, *Confederated Bands & Tribes of the Yakima Indian Nation v. State of Washington*, Civil No. 72-2732 (E.D. Wash. Dec. 1, 1972), the plaintiff tribe was limited to the issue of whether the impact of R.C.W. ch. 37.12 was a violation of the equal protection and due process clauses of the fourteenth amendment. *Confederated Bands & Tribes of the Yakima Indian Nation v. Washington*, Civil No. 72-2732 (E.D. Wash. June 28, 1973). As noted by Justice Powell in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), impact alone, if severe enough, can be sufficient to create a prima facie case of purposeful discrimination. The showing, however, will rarely be that extreme. *Id.* at 266 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

126. See text accompanying notes 119-21 *supra*. See also *Yakima II*, 552 F.2d 1332, 1334 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978); *Yakima I*, 550 F.2d 443, 453 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

127. Washington's original response to the passage of PL-280 was to attempt to assume total jurisdiction over all Indian reservations. See Goldberg, *supra* note 5, at 547 n.58; 5 U.S. COMM'N ON CIVIL RIGHTS, REPORT: JUSTICE 145 (1961). The tribes of Washington, however, mounted a successful campaign to defeat the proposed legislation. In 1957, R.C.W. ch. 37.12 was approved as a compromise measure, allowing for assumption of full state PL-280 jurisdiction only when the tribe requested it. That situation was considered adequate until the early 1960's when a United States Supreme Court decision resulted in the release from prison of Indians convicted of crimes in towns on Indian reservations. *Seymour v. Superintendent*, 368 U.S. 351 (1962). The result was political pressure from non-Indians living on Indian reservations for law enforcement protection against Indian law-breakers.

In light of this background, one purpose of the title-based jurisdiction scheme appears to have been to place non-Indian towns located on Indian reservations (*e.g.*, Toppenish, Wapato, and Omak) under state law. *Seattle Times*, Jan. 22, 1963, at 4, col. 2, 3. The objective was to acquire jurisdiction over Indian law-breakers in those non-Indian communities. Washington already had jurisdiction under prevailing Indian law doctrine over crimes committed by non-Indians against non-Indians on a reservation. See note 97 *supra*.

The eight subject areas over which the state assumed jurisdiction on non-fee land appear to be primarily aimed at the state's concern for children. See Governor's Message to the Senate in Connection with signing of Senate Bill No. 56, WASH. S.J., 38th Leg., Ex. Sess. 939 (1963) [hereinafter cited as Governor's Message]. Just prior to the 1963 enactment, the Washington Supreme Court had invalidated two custody proceedings involving Indian children. One case involved an abandoned child; the other involved four children removed from their parents' custody. *In re Colwash*, 57 Wn. 2d 196, 356 P.2d 994 (1960); *Adams v. Superior Court*, 57 Wn. 2d 181, 356 P.2d 985 (1960). See 36 WASH. L. REV. 156 (1961).

While the state's concern for the welfare of Indian children is undoubtedly in good faith, exclusive state control may be destructive of Indian cultural survival. Legislation is currently pending to give Indians a voice in the adoption of Indian children. The Indian Child Welfare Act of 1978 was passed by the Senate November 4, 1977, S. 1214, 95th Cong., 1st Sess., 123 CONG. REC. S 18874-77 (daily ed. Nov. 4, 1977), and is pending in the House, H.R. 12533, 95th Cong., 2d Sess. (1978). Also, many problems involving children cannot be adequately handled without jurisdiction over the parents. R.C.W. § 37.12.010 gives the state jurisdiction over juveniles but not adults on non-fee lands. See note 9 *supra*.

history of the enactment.¹²⁸

As a statute that is racially discriminatory on its face, R.C.W. ch. 39.12 should incur strict scrutiny, with the burden on the state to show that the classification is necessary to achieve a compelling state interest.¹²⁹ Because of the inadequate results of checkerboard jurisdiction, that burden would be substantial.¹³⁰

B. Parameters of a Rational Basis Test for PL-280 Statutes

If a statute purposely discriminates against Indians, the "suspect class" branch of strict scrutiny is invoked. Even where strict scrutiny is not mandated, however, the nature of the classification will be relevant in determining what degree of review should be applied under the less stringent rational basis test.¹³¹ The degree of review tends to increase with both the importance of the interest involved¹³² and the suspectness of the classification,¹³³ and to decrease to the extent that the subject matter of the legislation is more appropriately decided by

128. There are no records kept of committee hearings in the Washington legislature. Former Governor Rosellini did make a statement, however, when he signed the 1963 amendments to R.C.W. ch. 37.12. According to Governor Rosellini, the measure was a compromise between state and tribal interests. The main objectives of the bill were to deal with law enforcement problems and the problems of juveniles. The Governor also acknowledged the potential violation of the equal protection clause. Governor's Message, *supra* note 127.

129. See note 115 and accompanying text *supra*.

130. The state might establish a compelling state interest in law enforcement and the welfare of juveniles with the minimum infringement of Indian self-determination. However, showing that the particular jurisdiction scheme of R.C.W. § 37.12.010 is necessary to obtain those objectives would prove more difficult.

The state itself has found that the checkerboard pattern has produced inadequate results. STATE OF WASHINGTON, COMPREHENSIVE PLAN FOR LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: JANUARY 1-DECEMBER 31, at 751 (1973).

131. The rational basis test, when applied to state legislation challenged under the equal protection clause, ranges in strictness from an extremely deferential review to a standard approaching strict scrutiny. The deferential review is characterized by giving the statute a strong presumption of validity that will be defeated only if no relation can be found between the contested classification and any conceivable valid state purpose. See, e.g., *McDonald v. Board of Election Comm'r*, 394 U.S. 802 (1968); *McGowan v. Maryland*, 366 U.S. 420 (1961). In its stricter forms the rational basis test requires an actual rather than hypothetical state purpose, and a substantial rather than merely reasonable relation between the contested classification and the state purpose. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); *Reed v. Reed*, 404 U.S. 71 (1971); *Gunther*, *supra* note 115, at 18-24.

132. See, e.g., *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food stamps); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraceptives).

133. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimate children); *Reed v. Reed*, 404 U.S. 71 (1971) (sex).

the legislature.¹³⁴ All three considerations give Indians challenging state PL-280 statutes a strong claim to a stricter standard of review.

While the tribal interests threatened by state PL-280 jurisdiction may not qualify as "fundamental" as that term of art is used in equal protection cases,¹³⁵ they are certainly of considerable importance. The imposition of state civil and criminal authority on Indians has a substantial effect.¹³⁶ State jurisdiction threatens Indian culture, a result contrary to current federal Indian policy.¹³⁷ Indians have a long history of prejudicial treatment in American society. There are continuing conflicts between the interests of state governments on the one hand and Indian treaty rights and tribal policy on the other.¹³⁸ These conflicts strongly suggest that only limited deference should be given state legislation affecting Indians.

Indian law is not an area where states have inherent authority. States derive their power over Indians from express congressional grants of authority.¹³⁹ Since *Worcester v. Georgia*,¹⁴⁰ the federal judiciary has stood ready to protect tribal sovereignty from over-reaching by state governments.¹⁴¹

134. See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977) (immigration); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (state-funded disability plan).

135. Fundamental rights are those guaranteed either explicitly or implicitly by the United States Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

136. Besides feeling that state jurisdiction infringes upon their right of self-determination, Indians fear unfair treatment at the hands of the state. Such fears are not unfounded. See *Yakima I*, 550 F.2d 443, 453 (9th Cir. 1977) (dissenting opinion), *prob. juris. noted*, 98 S. Ct. 1447 (1978); INDIAN COURT JUDGES, *supra* note 10, at 3-12; 5 UNITED STATES COMM'N ON CIVIL RIGHTS REPORT: JUSTICE, 146-48 (1961).

137. See note 82 *supra*.

138. Current areas of conflict include fishing rights, water rights, taxation, and adoption. The history of Washington Supreme Court decisions in Indian law cases does not inspire confidence in the protection afforded Indians by that court. See, e.g., *Puget Sound Gillnetters v. United States Dist. Court*, 573 F.2d 1123 (9th Cir. 1978).

The state's [Washington's] extraordinary machinations in resisting the decree have forced the district court to take over a large share of the state's fishery Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

Id. at 1126. In the large majority of Washington Supreme Court cases on Indian law argued before the United States Supreme Court, the Washington decision has been either reversed or vacated in favor of Indians. *E.g.*, *Tonasket v. Washington*, 411 U.S. 451 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Tulee v. Washington*, 315 U.S. 681 (1942).

139. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973).

140. 31 U.S. (6 Pet.) 515 (1832).

141. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373, (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973).

Finally, an additional consideration unique to Indian law is the quasi-sovereign nature of Indian tribes.¹⁴² Judicial deference to state legislation is based in part on recognition of state autonomy. When state legislation is challenged by an Indian tribe, the state's interest in autonomy must be balanced to some degree against the tribe's sovereignty interest.¹⁴³ Although PL-280 permits state assumption of jurisdiction on Indian reservations, the courts should provide some meaningful assurance that states not only comply with PL-280, but also meet the constitutional standards of due process and equal protection.¹⁴⁴

In light of these considerations, courts should require as a minimum that any classifications made by state PL-280 statutes bear a fair and substantial relation to an actual, as opposed to a hypothesized, state purpose.¹⁴⁵

C. *The Yakima II Decision*

In *Yakima II*¹⁴⁶ the Ninth Circuit Court of Appeals held that R.C.W. § 37.12.010 violated the equal protection clause of the fourteenth amendment in predicated criminal jurisdiction on Indian reservations on the title to the land where a crime occurs. The court limited its examination to the title-based aspects of Washington's criminal jurisdiction.¹⁴⁷ Because the court discerned no way to sever

142. See *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168-73 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); Gonzalez, *Indian Sovereignty and the Tribal Right to Charter a Municipality: A New Perspective for Jurisdiction on Indian Land*, 7 N.M.L. REV. 153 (1977).

143. The sources of tribal sovereignty and state sovereignty are distinct. The former is usually primordial, antedating the United States Constitution and guaranteed to Indians by treaties with the United States. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). State sovereignty is guaranteed by the tenth amendment to the United States Constitution.

144. It is not suggested here that the interest in tribal sovereignty alone should invoke strict scrutiny in an equal protection case. Clearly PL-280, as it existed prior to 1968, permitted states to acquire jurisdiction on Indian reservations and, to that extent, to restrict tribal sovereignty. Nevertheless, in light of present federal policy fostering Indian self-determination, the courts should review state PL-280 legislation—not merely rubber stamp it as is often the case under the more deferential forms of the rational basis test—to assure that the state has exercised the PL-280 option in a proper fashion.

145. *Reed v. Reed*, 404 U.S. 71 (1971) (applied "fair and substantial relation" test to sex discrimination). Cf. Gunther, *supra* note 115, at 20-24 (equal protection with "bite").

146. 552 F.2d 1332 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

147. Compliance with PL-280 was decided in the state's favor in the earlier *en banc* decision. *Yakima I*, 550 F.2d 443 (9th Cir. 1977). See notes 106-08 and accompanying text *supra*.

the title-based criminal jurisdiction from the statute, the entire statute was held unconstitutional.¹⁴⁸

Under R.C.W. ch. 37.12, Indians living on fee land are accorded full state PL-280 law enforcement protection, while Indians living on non-fee land receive state protection in only eight subject matter areas.¹⁴⁹ The court tested that classification¹⁵⁰ under the rational basis standard and still found that R.C.W. § 37.12.010 violated the fourteenth amendment.¹⁵¹ It is clear, however, that the court applied something more than minimal scrutiny. Only the state purpose suggested by the state in its argument, namely to limit jurisdiction to "areas of 'fundamental' and 'over-riding' concern," was considered.¹⁵² The court refused to hypothesize a valid purpose.¹⁵³ As noted above,¹⁵⁴ more than minimal scrutiny is warranted when examining state PL-280 statutes, but the court here may have been overly exacting. Some formulations of the rational basis test do not require a court to look beyond articulated state purposes.¹⁵⁵ Nevertheless, it behooves a lower court to make some inquiry as to the actual state purposes¹⁵⁶ if the decision is to be sustained on appeal.¹⁵⁷

148. 552 F.2d at 1336.

149. See note 9 *supra*.

150. 552 F.2d at 1334. The court noted that there were a host of other classifications it might examine—for example, the problem presented when an adult and a juvenile are charged with the same crime on non-fee land. The juvenile would be tried in state court, the adult in either federal or tribal court. *Id.* at 1334 n.3. See note 97 *supra*.

151. 552 F.2d at 1335. The court rejected strict scrutiny. See text accompanying notes 118–21 *supra*. It should be noted that the choice of a classification affects the ease of proving facts sufficient to invoke strict scrutiny. The court examines a classification with Indians in both halves. See note 150 and accompanying text *supra*.

152. 552 F.2d at 1335.

153. "[The state] did not argue that any other purpose was intended to be served by this limited jurisdiction over criminal acts committed on reservations, and no other rationale leaps to our eyes." *Id.*

One might conjecture that the state avoided offering other state objectives, such as striking a balance between Indian and non-Indian political interests, see note 127 and accompanying text *supra*, for fear the court would then apply a strict scrutiny based on a racial classification.

154. See Part III-B *supra*.

155. Cf. *Trimble v. Gordon*, 430 U.S. 762 (1977) (the Court considered only those purposes enunciated by the state supreme court in upholding the statute); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (the Court considered only those purposes found either in the statute itself or its legislative history); Gunther, *supra* note 115, at 46–48 (courts should consider articulated purposes from authoritative state source).

156. Professor Gunther suggests that courts require that a state purpose have a basis in fact. Gunther, *supra* note 115, at 21. The problem with relying on articulated purposes is that it allows the attorney for the state, instead of the court, to argue conceivable purposes that may have no basis in fact.

157. For example, one purpose of R.C.W. § 37.12.010 may have been to reconcile the desires of non-Indians living on reservations to receive state law enforcement pro-

The court also failed to address the effect of shared jurisdiction. Under PL-280 the federal government ceded only whatever jurisdiction the state assumed.¹⁵⁸ Therefore, on non-fee land, where Washington exercises jurisdiction over only eight subject matters,¹⁵⁹ the federal government and the tribe retain residual jurisdiction. No Indian is denied police protection or access to the courts; rather Indians living on fee land look to the state while those living on non-fee land look primarily to the tribe and the federal government. At a minimum, the court should have explained why the alternate federal and tribal jurisdiction was not an adequate alternative to state jurisdiction.¹⁶⁰

The court's disposition in *Yakima II* requires explanation. At first glance it seems inconsistent for the court to invalidate all state PL-280 jurisdiction on the Yakima reservation after finding that the statute's shortcoming was its failure to extend full PL-280 jurisdiction to those Indians living on non-fee as well as fee lands.¹⁶¹ However, the alternative of extending full state PL-280 jurisdiction over all reservation lands would not only grant the exact opposite of what plaintiff sought,¹⁶² it would also accomplish what the state is now prohibited

tection with the desires of Indians to maintain tribal sovereignty. See note 127 and accompanying text *supra*. Upon examination the court might well have found all the actual purposes of the statute impermissible or not reasonably furthered by the contested classification. The opinion is weakened, however, because it fails to consider any purpose other than that offered by the state. The court, for example, did not consider a "different theory of the statute's purpose" advanced by Yakima County, a co-defendant in the case. 552 F.2d 1332, 1335 n.7 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

158. See *Kennerly v. District Court*, 400 U.S. 423 (1971).

159. See note 9 *supra*.

160. The Ninth Circuit Court of Appeals was recently reversed in another Indian equal protection case when it held that being under the jurisdiction of a different authority was a denial of equal protection. Defendants had been convicted in federal district court of felony murder on a reservation. The applicable state law (Idaho) under which the defendants would have been tried were they non-Indian included no felony murder statute. Thus, the prosecution, by virtue of being under federal jurisdiction, did not have to prove premeditation. The Ninth Circuit, applying strict scrutiny, reversed, ruling that the defendants had been denied equal protection on the basis of race. *Antelope v. United States*, 523 F.2d 400 (9th Cir. 1975). The Supreme Court reversed and reinstated the conviction. *United States v. Antelope*, 430 U.S. 641 (1977). See also *Fisher v. District Court*, 424 U.S. 382 (1976).

161. The court explained that it was "unable to attribute to Washington a willingness to include more jurisdiction that it undertook partially to assume." *Yakima II*, 552 F.2d 1332, 1336 (9th Cir. 1977), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

162. The Yakimas were one of the original tribes to object to the possibility of state jurisdiction when PL-280 was being debated in Congress prior to the 1953 enactment. BACKGROUND REPORT, *supra* note 63, at 17.

from doing without tribal consent under the 1968 amendments to PL-280.¹⁶³

In summary, although the analysis in *Yakima II* is incomplete, the result is defensible and succeeds in invalidating a statute that served the interests of neither the state nor the tribes.

IV. CONCLUSION

If *Yakima II* is upheld, Washington will no longer have criminal or civil jurisdiction on those reservations where the tribe has not consented to state jurisdiction.¹⁶⁴ Unless R.C.W. ch. 37.12 is overturned for failure to amend the disclaimer clause in the state constitution, state PL-280 jurisdiction should not be affected on those reservations where the tribe has requested state jurisdiction.¹⁶⁵ In any case, unilateral imposition of state jurisdiction on those reservations affected by *Yakima II* is now foreclosed by the 1968 amendments to PL-280. Any replacement for R.C.W. ch. 37.12 will require the agreement of both the tribe and the state.¹⁶⁶ This result will hopefully provide the flexibility to solve the complex jurisdictional problems existing on Indian reservations, while protecting the rights of Indian tribes to self-determination.

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163. See notes 88-89 and accompanying text *supra*.

164. Although *Yakima II* applied only to the plaintiff tribe, no logical distinction could save R.C.W. ch. 37.12 if challenged by other non-consenting tribes. Two tribes, the Lummi and the Makah, have already secured such a judgment. *Confederated Tribes of the Colville Reservation v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978).

165. There are no partial jurisdiction or equal protection problems with respect to consenting reservations. However, because the Supreme Court can be expected to avoid the constitutional issue of equal protection, see *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), it is certainly not inconceivable that *Yakima II* will be affirmed on the basis of the disclaimer issue.

166. See notes 86-90 and accompanying text *supra*.